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No. 94-1039

In The

Supreme Court of the United States

October Term, 1994

ROY ROMER, as Governor of the State of Colorado, and the STATE OF COLORADO,

Petitioners,

vs.

RICHARD G. EVANS, ANGELA ROMERO, LINDA FOWLER, PAUL BROWN, PRISCILLA INKPEN, JOHN MILLER, the BOULDER VALLEY SCHOOL DISTRICT RE-2, the CITY AND COUNTY OF DENVER, the CITY OF BOULDER, the CITY OF ASPEN, and the CITY COUNCIL OF ASPEN,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Colorado Case Nos. 94SA048 And 94SA128

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether an initiated state constitutional amendment that forbids the state and all local governments from adopting or enforcing any law or policy protecting lesbians, gay men and bisexuals from discrimination violates the Equal Protection Clause of the Fourteenth Amendment because it burdens the fundamental right of lesbians, gay men and bisexuals to participate in the political process and it fails rationally to advance a legitimate governmental purpose.

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STATEMENT OF THE CASE

On November 3, 1992, a majority of Colorado voters approved a state constitutional amendment ("Amendment 2") that provides:

> Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of, or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be self-executing.

The amendment deprives all branches and departments of state government (the legislative, executive, and judicial), state agencies (including state universities and colleges), political subdivisions of the state (including counties), municipalities and school districts of the power to remedy "*any* claim of discrimination" based on "homosexual, lesbian or bisexual orientation." Thus, as

amended, the state's basic charter would authorize discrimination against lesbians, gay men and bisexuals in a variety of public and private contexts and immunize such discrimination from regulation or redress at any level of government.[1]

The effect of Amendment 2 is both to repeal existing anti-discrimination laws and policies[2] and to prohibit the future adoption of any similar laws and policies. Among the government enactments that would be repealed by Amendment 2 are the following: the Denver, Boulder, Aspen, Telluride and Crested Butte ordinances prohibiting discrimination in employment, housing and public accommodations on the basis of sexual orientation, Denver Municipal Code, art. IV, §§ 28-91 to -116 (1991), Boulder Revised Code, §§ 12-1-2 to -4 (1987), Aspen Mun. Code § 13-98 (1977), Telluride Ordinance No. 974 (series 1993), and Crested Butte Ordinance No. 6 (series 1993)[3];

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[1] The state has conceded that the amendment is unconstitutional to the extent that it prohibits lesbians, gay men and bisexuals from litigating in the state courts claims "which could otherwise have been brought by those individuals under federal law." State's Opening Brief, prelim. inj. appeal at 16.

[2] The enactments that would be repealed by Amendment 2 all refer to discrimination on the basis of "sexual orientation" or "sexual preference." Because Amendment 2 addresses only "homosexual, lesbian or bisexual orientation," the enactments would remain valid to the extent that they prohibit discrimination on the basis of *heterosexual* orientation.

[3] While Boulder and Denver, by popular referenda, adopted ordinances prohibiting discrimination on the basis of sexual orientation, the voters of Fort Collins and Colorado Springs rejected similar measures. The Colorado Civil Rights Commission's proposed legislation prohibiting discrimination on the basis of sexual orientation in employment, housing and public accommodations was not introduced in the General Assembly.

the Boulder Valley School District RE-2 policy that permits students to seek redress for discrimination based on sexual orientation; and section 10-3-1104, 4A C.R.S. (1993 Supp.) of the Colorado Insurance Code, which prohibits discrimination on the basis of sexual orientation in insurance underwriting practices such as the refusal to write health or life insurance for persons who live in certain residential areas, who are engaged in certain occupations, or who designate a non-related individual as an insurance beneficiary.

Amendment 2 also would repeal the policies at Colorado State University, Mesa College and the University of Southern Colorado that protect against discrimination on the basis of sexual orientation; the Governor's Executive Order No. D0035 (December 10, 1990) prohibiting discrimination on the basis of sexual orientation in state employment; and ordinances or resolutions prohibiting discrimination on the basis of sexual orientation in government employment for Aurora, Denver, and Boulder County.

Amendment 2 would prohibit the adoption or enforcement of any future legislation or administrative policies similar to those that it would repeal. As one of the officials of Colorado for Family Values – the group that sponsored Amendment 2 – testified, the purpose of the amendment was "simply [to] close the lid on the entire issue of [civil rights for gays] here in Colorado." Record at 15:853.

On January 15, 1993, the Denver District Court granted the plaintiffs' motion to preliminarily enjoin the enforcement of Amendment 2.[4] The Colorado Supreme Court affirmed the preliminary injunction in *Evans v. Romer*, 854 P.2d 1270 (Colo. 1993), holding that Amendment 2 is subject to strict judicial scrutiny because it "fences out" an independently identifiable class of persons and burdens their fundamental right to participate in the political process. Pet. app. D at 25-27.

After eight days of trial, the district court ruled that Amendment 2 does not serve any compelling state interest by the least restrictive means and permanently enjoined the amendment's enforcement.[5] The court certified its decision as final under C.R.C.P. 54(b) because a number of the plaintiffs' claims remain pending – including the plaintiffs' other equal protection theory, that Amendment 2 did not rationally advance any legitimate governmental purpose, the plaintiffs' claim that the amendment is unconstitutionally vague, and the individual plaintiffs' claims that the amendment violated their right to free expression and association under the First Amendment. The Colorado Supreme Court upheld the

[4] The plaintiffs are lesbians or gay men who had worked to obtain legislation or government policies that protect them from discrimination. The cities of Denver, Boulder and Aspen and the Boulder Valley School District also are plaintiffs.

[5] The district court did not hold that sexual orientation is a suspect classification.

permanent injunction, affirming the district court determination that Amendment 2 does not serve any compelling state interest. *Evans v. Romer*, 882 P.2d 1335 (Colo. 1994). Pet. app. B.

REASONS FOR DENYING THE PETITION

I. THE DECISION OF THE COLORADO SUPREME COURT IS CONSISTENT WITH THIS COURT'S DECISIONS.

Contrary to the contentions of the state, *Evans* correctly applies this Court's precedents. Therefore, there is no inconsistency between *Evans* and this Court's decisions justifying certiorari review pursuant to Sup. Ct. R. 10.1(c).

A. The Colorado Supreme Court correctly applied this Court's decisions in *Hunter v. Erickson*, *Gordon v. Lance*, *James v. Valtierra*, and *Washington v. Seattle School District*.

The state contends that the *Evans* decision misapplies this Court's decisions in *Hunter v. Erickson*, 393 U.S. 385 (1969), *James v. Valtierra*, 402 U.S. 137 (1971), and *Washington v. Seattle School District*, 458 U.S. 457 (1982).[6] According to the state, these cases "call for strict scrutiny *only*

[6] In *Hunter*, this Court invalidated an initiated Akron, Ohio charter amendment which repealed the city's fair housing ordinance and which provided that any ordinance enacted by the city council dealing with racial, religious, or ancestral discrimination in housing was not to be effective unless approved by a majority of the city voters. In *James*, this Court

when the political process has been restructured to place unusual burdens upon racial groups or other suspect classes." Pet. at 11 (emphasis in original).

The state reaches this conclusion by ignoring this Court's analysis in *Hunter* that contradicts the state's position. The *Hunter* Court noted that "the State may no more disadvantage *any* particular group by making it more difficult to enact legislation in its behalf than it may dilute *any* person's vote or give *any* group a smaller representation than another of comparable size." *Hunter*, 393 U.S. at 393 (emphasis added). Twice the Court explained that the amendment in *Hunter* was constitutionally offensive because it disadvantaged one particular group by making it more difficult for its members to participate in the political process. 393 U.S. at 391, 392-393. First, this Court referred to the amendment before it as a denial of the right to vote on an equal basis; and, second, the Court equated procedures that make it more difficult to enact protective legislation with dilution of voting power. *Id.* In both instances, the Court cited *Reynolds v. Sims*, 377 U.S. 533 (1964), and *Avery v. Midland County*, 390 U.S. 474 (1968), two voting rights malapportionment cases that did not involve suspect classifications

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upheld an initiated provision of the California Constitution which provided that no low-rent housing project should be developed, constructed, or acquired by a state public body until the project was approved by a majority of the community's voters. In *Washington*, this Court invalidated a state initiative which provided that no school board should require any student to attend a school other than the school geographically nearest the student's residence.

but rather classifications that discriminated against urban residents and in favor of rural residents. *Id.*

Although, as the Colorado Supreme Court recognized, *Hunter* speaks clearly to the constitutionality of Amendment 2, the state argues that *Hunter* is simply about "suspect classifications." Pet. at 11. If this were the case, however, it would have been unnecessary for the *Hunter* Court to discuss why participation in the political process is a fundamental right and to cite *Reynolds* and *Avery*: the *Hunter* Court simply could have applied heightened judicial scrutiny based upon the presence of a suspect classification in the challenged law.[7]

The state relies on this Court's decisions in *James* and *Washington* for the proposition that the *Hunter* doctrine applies only to laws containing suspect classifications such as racial classifications. However, the state errs in interpreting *James* and *Washington*. In both cases, this Court indicated that *Hunter* would apply to laws restructuring the political process "nonneutrally" to target members of racial groups. The opinions indicate that some burden on a racial group is *sufficient*, not *necessary*, for the *Hunter* doctrine to apply.

In *James*, this Court refused to strike down a requirement that low-income housing projects – sponsored by

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[7] Even if the holding in *Hunter* were based solely on the fact that Akron's charter amendment involved a racial classification, *Reynolds* and *Avery* stand for the proposition that the right to equal participation in the political process is fundamental and not dependent upon the existence of a racial classification. *See infra*. at 11-14.

the state government and funded by the federal government – be subject to local referenda. The *James* Court found, based on the record in the case, that this referendum requirement did not target any racial group. 402 U.S. at 141. The Court also rejected the contention that the referendum requirement be invalidated simply "because it hampers persons desiring public housing from achieving their objective." According to the *James* Court, "under any such holding, . . . a State would not be able to require referendums on any subject, unless referendums were required on all, because they would always disadvantage some group." *Id.* at 142.

James' holding is completely consistent with the *Evans* court's analysis of *Hunter* and does not limit *Hunter*'s application to laws burdening persons on the basis of suspect classifications. As this Court explained in *Gordon v. Lance*, 403 U.S. 1, 5 (1971),[8] decided six weeks after *James*, the *Hunter* doctrine applies only when a law targets some "independently identifiable group." Likewise, the *Evans* court applied *Gordon*'s limitation on the *Hunter* doctrine in holding that the *Hunter* doctrine does not apply to laws unless those laws target groups identified "apart from the group created by the [challenged] statute itself." Pet. app. D at 20. In other words, when a group is defined only by its members' common desire to enact that which the challenged law "hampers," then the

[8] In *Gordon*, this Court upheld West Virginia constitutional and statutory provisions which provide that political subdivisions of the state may not incur bonded indebtedness or increase tax rates beyond those established by the constitution without the approval of 60% of the voters in a referendum election.

group is not identifiable "independently" from the statute being challenged.

Read in light of *Gordon*, *James* held only that "persons desiring public housing" are not an *independently* identifiable group within the meaning of *Hunter* and *Gordon*. Such persons are identifiable as a group only by their desire to enact that which the referendum requirement makes more difficult – government-sponsored low-income housing projects. While, as *James* observed, every referendum requirement "always disadvantages some group," 402 U.S. at 142, the group must be identified by more than its opposition to the referendum requirement for the group to be identifiable independent from that requirement.

Racial groups are indeed independently identifiable: they are defined by their members' common characteristics that exist apart from the desire to enact what a referendum requirement – such as *Hunter*'s ban on fair housing legislation – makes more difficult to achieve. However, contrary to the state's assertion, just because racial groups constitute an independently identifiable group does not imply that racial groups or other suspect classifications are the only groups that are independently identifiable. As *Gordon* explains, a group is "independently identifiable" whenever its members are united by some common characteristic that is not simply created by the referendum requirement that the individual members are united in opposing.[9] 403 U.S. at 5.

[9] The relevant "independently identifiable group" is the group whose needs the government is barred from addressing.

In short, because the law challenged in *James* did not involve any targeting of an *independently identifiable* group, it did not fall within the scope of *Hunter*. By contrast, in this case there is no dispute that (1) Amendment 2 was enacted to express disapproval and limit the rights of gays, lesbians, and bisexuals and (2) gays, lesbians, and bisexuals are identifiable by characteristics other than a desire to enact that which Amendment 2 makes more difficult to enact. Therefore, unlike the law in *James*, Amendment 2 falls within the scope of *Hunter*, and the Colorado Supreme Court in *Evans* properly construed *Hunter* to require strict judicial scrutiny of Amendment 2.

In *Washington*, 458 U.S. 469-70, this Court endorsed Justice Harlan's statement that the state may not create a political structure that deliberately excludes targeted groups from an opportunity to influence the political process. This Court stated that "[w]hen the State allocates governmental power *non-neutrally*," such allocations of power violate the Fourteenth Amendment. *Washington*, 458 U.S. at 470 (emphasis added).

Of course in *Washington*, 458 U.S. at 470, the Court noted that the state had violated the requirement that the political process be neutral by "explicitly using the racial nature of a decision to determine the decision-making process." However, nothing in *Washington* suggests that the government "allocates power non-neutrally" *only* when government enacts a racial classification. Rather,

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Hunter, 393 U.S. at 393 ("the State may no more disadvantage any *particular* group by making it more difficult to enact legislation in its behalf than it may dilute any person's vote") (underlining added); *Washington*, 458 U.S. at 468, 472, 476.

this Court stated that Washington restructured its political process "non-neutrally" because it did not "place obstacles in the path of everyone seeking to secure the benefits of governmental action." 458 U.S. at 470. Such "fencing out" of only one group in the political process is precisely what Amendment 2 accomplishes.

B. *Evans* is consistent with this Court's jurisprudence protecting rights to political participation.

The state also takes issue with *Evans'* reliance on this Court's decisions concerning the fundamental right to political participation. *See Reynolds*, 377 U.S. 533; *Williams v. Rhodes*, 393 U.S. 23 (1968); *Kramer v. Union Free School Dist.*, 395 U.S. 621 (1969); *Hunter*, 393 U.S. 385. According to the state, the *Evans* court erred in inferring from these cases that the Fourteenth Amendment protects a fundamental right to participate in the political process. Instead, the state contends that these cases protect no more than the right to cast an equally weighted ballot and to be free from certain arbitrary ballot access restrictions.

The state's narrow view of this Court's precedents ignores the unique protection this Court has afforded the right to political participation, and not merely particular instances of that right. *See generally* John Hart Ely, *Democracy and Distrust* (1980); *United States v. Carolene Products*, 304 U.S. 144, 152-53 n.4 (1938). As this Court noted in *Reynolds*:

> "representative government is in essence self-government through the medium of elected representatives of the people, and each and every

> citizen has an inalienable right to *full and effective participation in the political process* of this State's legislative bodies."

377 U.S. at 565 (emphasis added). Since *Reynolds*, this Court has several times reaffirmed its holding that the fundamental right involved is a fundamental right to equal access to the process of self-government, most recently in *New York City Board of Estimate v. Morris*, 489 U.S. 688, 693 (1989).

Amendment 2 bars enactment and enforcement at all levels of state and local government of "any" laws or policies that might benefit or protect gay, lesbian and bisexual persons. The barrier to political participation is the requirement that only a majority of the voters of the state[10] can provide gays, lesbians and bisexuals relief from discrimination in a municipality or enact a protective policy in a school district.[11] Indeed, the state admits that the purpose of Amendment 2 is to exclude even debate or discussion of "gay rights" from all public, political fora in Colorado in order to express disapproval toward lesbians, gays, and bisexuals. Record at 15:839,

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[10] A state constitutional amendment that would repeal or supersede Amendment 2 must be referred to the state electorate by the state legislature or by petition containing valid signatures of registered electors in an amount equal to 5% of the total number of votes cast for secretary of state.

[11] *See Washington*, 458 U.S. at 483 (the Washington initiative transferred local "decision-making authority . . . [to] a new and remote level of government"). In contrast, the initiative in *James* protected local decision-making, requiring that federally-funded public housing be approved by a majority of the voters in the community where it would be located.

853; affidavit of John Finnis at ¶¶ 16, 17. Such a ban on one group's interest from consideration is not different in kind from exclusion of a single political party's program from the ballot. *Anderson v. Celebrezze*, 460 U.S. 780, 787, 793 (1983); *Williams*, 393 U.S. at 30-31.

Moreover, Amendment 2 is far broader than the laws that this Court struck down in *Hunter* and *Washington*. Unlike the laws at issue in those cases, Amendment 2 does not merely burden attempts to enact a specific law, such as a fair housing law or a school desegregation plan; rather, Amendment 2 burdens "any statute, regulation, ordinance or policy" intended to protect or benefit lesbians, gay men or bisexuals.

In sum, Amendment 2 has an undisputed discriminatory purpose and a dramatic discriminatory effect on the ability of gay, lesbian and bisexual persons to represent their interests before state and local government in Colorado. The state argues that the amendment's barrier to political participation is permissible so long as the government preserves all constituents' right to cast an equally weighted ballot. However, the right to cast a ballot does not provide "full and effective participation in the political process," *Reynolds*, 377 U.S. at 565, when the representatives elected by the ballot are constitutionally forbidden from acting to protect the civil rights of the burdened constituency. Burdening a group's ability to advance legislation in its interests undermines the process of representative government just as effectively as diluting or otherwise restricting the votes of that group. The Fourteenth Amendment forbids "sophisticated as well as simple-minded modes of discrimination" in the political process. *Reynolds*, 377 U.S. at 563. Therefore,

Evans correctly held that Amendment 2 deprives the plaintiffs in this case of a fundamental right of political participation within the meaning of *Hunter*. *Evans* is consistent with this Court's precedents and is not worthy of certiorari review under Sup. Ct. R. 10.1(c).

II. THE COLORADO SUPREME COURT DID NOT HOLD THAT SEXUAL ORIENTATION IS A "SUSPECT CLASSIFICATION."

The state contends that *Evans* is inconsistent with several decisions by federal courts of appeal holding that sexual orientation does not constitute a suspect classification. This is incorrect. The *Evans* court did not reach the issue of whether sexual orientation constitutes a "suspect" or "quasi-suspect" classification. Pet. app. B at 6, n.3. Indeed, the trial court rejected the plaintiffs' "suspect classification" theory. Since alternative theories supported their equal protection claim, the plaintiffs did not appeal the trial court's ruling to the state supreme court. *Id.*

The state, however, contends that the practical effect of *Evans* makes sexual orientation a suspect classification. Apparently, the state maintains that any legal classification on the basis of sexual orientation in Colorado will be subjected to strict judicial scrutiny under *Evans*.

This contention is wrong. If the state were to enact new laws putting other, special burdens on lesbians, gay men and bisexuals, the standard of review would not be governed by *Evans*. *Evans'* requirement of strict judicial scrutiny applies only when a law like Amendment 2 bars the normal governmental bodies from considering *any*

legislation intended to benefit or protect gay, lesbian or bisexual constituents. Therefore, because *Evans* neither expressly nor implicitly makes sexual orientation into a suspect classification, *Evans* is consistent with all decisions of federal appellate courts, and such alleged inconsistency cannot be the basis for certiorari review in this case. *See* Sup. Ct. R. 10.1(b).

Indeed, the only federal court to apply *Hunter* to a law similar to Amendment 2 has reached a decision identical on that issue to the decision of the Colorado Supreme Court in *Evans*. *Equality Foundation of Greater Cincinnati v. City of Cincinnati*, 860 F.Supp. 417 (S.D.Ohio 1994); 838 F.Supp. 1235 (S.D.Ohio 1993). If anything, the unanimity of courts concerning the application of this Court's precedents to laws like Amendment 2 suggests that the petition for certiorari review ought to be denied. *See* Sup. Ct. R. 10.1(a)-(b).

III. THE DECISION OF THE COLORADO SUPREME COURT PRESENTS NO THREAT TO THE RIGHT OF DEMOCRATIC SELF-GOVERNANCE.

The state contends that *Evans* will disrupt democratic decision-making and "inject[ ] the judiciary into a broad range of issues heretofore reserved for state legislatures or to Congress." Pet. at 16. This contention also lacks merit and does not provide a basis for granting certiorari review.

At the outset of its argument, the state correctly notes that *every* law will affect some persons more than others and that every law affects some identifiable group of persons – namely, the group of persons defined by the

statute. For instance, a state-wide speed limit for motor vehicles may be described as singling out all drivers who exceed the speed limit. However, the holding of *Evans* is limited to cases in which the law "fences out" a group that can be identified independently of the law being challenged. The limit on *Evans'* holding underscores the essential principle that the equal protection clause of the Fourteenth Amendment forbids the exclusion of *persons* from the political process, not the preemption of *issues*.

This principle strikes the proper balance between the right of the majority to engage in democratic self-government and the right of all persons to participate in the political process. Persons are not excluded from political participation simply because they fail to secure a majority of votes on a single issue: political loss is a necessary part of the political process, in which different factions contend for different government measures, sometimes winning and sometimes losing, but are never excluded totally from the process of presenting proposals for consideration by democratic institutions. *Hunter*, 393 U.S. at 393-94.

All five of the constitutional provisions cited by the state in support of its contention, pet. at 16-19, preempt *issues*; they do not exclude any *independently identifiable group*. Indeed, the state's five examples indicate that Amendment 2 is unique in its total exclusion of one constituency from *all* political fora in Colorado.

For instance, Colorado's constitutional term limit excludes the incumbents of *all* factions and parties equally: it fences out no particular group, nor does it

target any particular constituency. To use Justice Harlan's words in *Hunter*, a limit on terms

> obviously does not have the purpose of protecting one group to the detriment of all others. It will sometimes operate in favor of one faction; sometimes in favor of another.

393 U.S. at 393-94.

As the state notes, term limits prevent "supporters of particular incumbents," pet. at 18, n.12, from re-electing their preferred candidates. However, this group – "supporters of particular incumbents" – is not *independently* identifiable: like supporters of particular types of bonded indebtedness, one "can discern no independently identifiable group" that favors incumbency as such. *Gordon*, 403 U.S. at 5.

Of course, a term limit has a disparate impact on the aggregate of all persons who wish to re-elect incumbents. But these persons are not identifiable independent of their desire to accomplish what the challenged provision forbids. The group, therefore, is not "independently identifiable" – that is, identifiable as a group independent of its members' opposition to term limits.

A similar analysis applies to all of the other state constitutional provisions cited by the state. In each case, the "group" affected is defined by nothing more than its members' support for legislation prohibited by the constitutional provision. *See* Colo. Const. art. V, § 50 (restrictions on state funding of abortions); art. XIV, § 3 and art. XX, § 1 (restrictions on annexation by Denver); art. XVIII, § 9 (restrictions on locations where gambling is legal); art. XX, § 7 (limitation on structure of Denver school district).

In no case does the cited provision deliberately single out a specific constituency having an identity that transcends a narrow political controversy and bar normal political institutions from considering *any* laws or policies intended to benefit that constituency. These provisions burden a group that is defined only by support of the forbidden program or law; they do not exclude an independently identifiable group from participation in the political process.

By contrast, Amendment 2 singles out in its text a group of persons – "homosexuals, lesbians, and bisexuals" – who comprise a group independent of any shared interest in enacting what Amendment 2 forbids. Lesbians, gay men, and bisexuals are identifiable as a group by their sexual orientation, a trait that is unrelated to the existence of anti-discrimination laws or Amendment 2. *See* testimony and exhibits addressing the genetic and social origins of sexual orientation, 13:242-338, 371-427; 14:468-91.

It would be difficult to imagine a more deliberate exclusion of an independently identifiable group's interests from consideration in the political process. By the same token, however, *Evans* provides no basis for the extension of its principles to laws other than those that are similar to Amendment 2.

Prohibiting legislative, judicial, or executive protection of a group's civil rights uniquely burdens the group's participation in the political process. Such a drastic curtailment of effective political participation prevents a constituency from using the democratic process to protect itself from majoritarian excesses.

The decision in *Evans* reflects a continuing theme in this Court's jurisprudence: courts should not be reluctant to overturn the will of the people if its expression is unconstitutional. *See, e.g., Hunter,* 393 U.S. 385; *Reitman v. Mulkey,* 387 U.S. 369 (1967); *Lucas v. Colorado Gen'l Assembly,* 377 U.S. 713 (1964); *NAACP v. Button,* 371 U.S. 415 (1963); *see* Colo. Const. art. II, § 2 (the people of Colorado may "alter and abolish their constitution and form of government whenever they may deem it necessary to their safety and happiness, provided, such change be not repugnant to the constitution of the United States").

IV. IT IS PREMATURE TO GRANT CERTIORARI REVIEW OF THE ISSUES RAISED IN THIS CASE.

Evans is consistent with this Court's decisions in *Hunter, Gordon, Washington,* and *James.* However, even assuming *arguendo* that the application of these precedents were less clear, it would be premature to resolve the application of these precedents by granting the state's certiorari petition to review this case.

Only two courts have discussed the application of *Hunter* to Amendment 2 or a similar law – the Colorado Supreme Court and a federal district court in the Southern District of Ohio. The rulings by the Ohio federal court in *Equality Foundation* are pending before the United States Court of Appeals for the Sixth Circuit.[12] To grant

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[12] The federal district court in *Equality Foundation* ruled on all of the plaintiffs' federal constitutional challenges, determining that the Cincinnati initiative violated the plaintiffs' equal protection rights to participate in the political process, that the

certiorari review of the Colorado Supreme Court's decision would deprive this Court of potentially valuable discussion of these issues by lower courts.[13] *U.S. v. Mendoza*, 464 U.S. 154, 160 (1984) (This Court benefits from "permitting several courts of appeals to explore a difficult question before this Court grants certiorari."); *E. I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 135 n.26 (1977) (This case "exemplifies the wisdom of allowing difficult issues to mature through full consideration by the courts of appeals."); Samuel Estreicher & John Sexton, *A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study*, 59 N.Y.U. L. Rev. 681, 715-19, 719 n.146 (1984) (describing "affirmative value" of allowing legal issues to "percolate" in lower courts before being resolved by U.S. Supreme Court).

The federal question in *Evans* does not require such hasty resolution by this Court. No *federal* policy is affected by *Evans*, and the Colorado Supreme Court decision does not bind other state or federal courts. At most,

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initiative's classification is suspect, quasi-suspect and not rationally related to a legitimate state purpose, that the initiative violates the First Amendment, and that the initiative is unconstitutionally vague.

[13] According to the state, "at least fourteen other States were considering sponsoring measures similar to Amendment 2" in 1993 and 1994. Pet. at 20. Sponsors of the initiatives in most of the states did not obtain the required signatures to place the initiatives on the ballot. The two state-wide initiatives that were before the voters in November 1994 – in Oregon and Idaho – were defeated. The only similar anti-gay rights initiative that passed in 1994 is a charter amendment that bars the Alachua County, Florida commissioners from adopting laws that create sexual orientation classifications.

Evans enjoins one state law. If the state is correct that this issue will come up in other states, this Court will have ample opportunity to review the federal question without prematurely foreclosing lower court development of the law.

Moreover, if this Court reverses the decision of the Colorado Supreme Court, the case must be remanded to the district court to rule on the plaintiffs' remaining federal constitutional claims. The state courts have issued a final judgment on only one of the plaintiffs' federal claims, a single equal protection theory alleging a deprivation of a fundamental right to political participation under the Fourteenth Amendment. The trial court certified its resolution of this claim to the Colorado Supreme Court under C.R.C.P. 54(b). The plaintiffs' other federal claims remain pending before the trial court, and there is no final judgment on these non-certified claims under 28 U.S.C. § 1257. Were this Court to reverse *Evans*, it would have to remand the case for further state court proceedings on the remaining federal claims. In short, there will be no way of avoiding piecemeal federal review if this Court grants certiorari and reverses the state ruling. *See e.g. Local No. 438 Construction & General Laborers Union v. Curry*, 373 U.S. 542, 550 (1963).

V. IF REVIEW IS GRANTED, THIS COURT CAN AFFIRM THE RESULT IN *EVANS* UNDER THE PLAINTIFFS' OTHER EQUAL PROTECTION THEORY.

If this Court grants review, the Court can affirm the Colorado Supreme Court's decision by considering the

plaintiffs' other equal protection theory: that Amendment 2 does not rationally advance a legitimate governmental purpose. *See Yee v. Escondido*, 503 U.S. ___, 118 L.Ed.2d 153, 169-70 (1992); Robert L. Stern, Eugene Gressman, Stephen M. Shapiro & Kenneth S. Geller, *Supreme Court Practice* 344, 374 (7th ed. 1993) ("As a general rule, the respondent has the right to urge any argument in support of the judgment of the lower court, including contentions either rejected or not passed upon by the court below.") The district court did not rule on the plaintiffs' argument that Amendment 2 fails to rationally advance any legitimate governmental purpose. The plaintiffs, however, presented the rational relationship argument to the Colorado Supreme Court, arguing that Amendment 2 served neither the compelling interests advanced by the state nor any legitimate purpose.

At a minimum, equal protection requires that distinctions drawn by the government be "rationally related to a legitimate governmental interest." *Heller v. Doe*, 509 U.S. ___, 125 L.Ed.2d 257, 269-71 (1993); *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 446-47 (1985). The plaintiffs contend that the provisions of Amendment 2 and the campaign materials distributed throughout the state by the amendment's supporters demonstrated antipathy toward lesbians, gay men and bisexuals. Antipathy arising out of hostility or groundless stereotypes is not a legitimate purpose justifying a law under the equal protection clause. *Palmore v. Sidoti*, 466 U.S. 429, 434 (1984); *United States Department of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973). If this Court grants certiorari review of the decision of the Colorado Supreme Court, it

should direct the parties to address the plaintiffs' argument that Amendment 2 is not rationally related to a legitimate purpose.

CONCLUSION

The state's petition for certiorari should be denied. For the reasons set out at pages 5-11, *supra.*, the state's request that this Court summarily reverse the Colorado Supreme Court decision under *James* also should be denied.

Respectfully submitted,

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